No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

L. L. PRICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's brief in opposition fails to meet the points raised in support of the petition for certiorari. Additionally, and notwithstanding petitioner's reluctance to burden the Court with any additional material in this matter, the Court's attention should be called to some of the statements made by respondent which may leave an erroneous impression.

ARGUMENT

1. THE STATEMENT ALLEGEDLY MADE BY PETITIONER'S COUNSEL.

In discussing the failure of the court below to apply the doctrine of election of remedies to this situation, respondent goes outside the record herein (p. 8). Apparently from recollection, it is asserted that petitioner's

counsel, in oral argument, conceded respondent's right to maintain the instant court action "if the Board had not made a determination on the merits."

Respondent's assertion cannot be justified from the standpoint of its being factual or proper. While recognizing that this Court should be spared any discussion of matters not of record, it is necessary to state that no such concession was made. The opinion of the court below does not indicate it was aware of any such concession as alleged by respondent. It is reasonable to assume that such a statement, if made, would have been mentoned in the opinion.[1]

2. INTRODUCTION OF SUBMISSIONS AND FINDINGS.

Respondent suggests (footnote 2, p. 6) that in some fashion petitioner was inconsistent in questioning the action of the court below in reviewing the submissions to the Board and the Board's Findings because these documents were its exhibits in support of its motion for summary judgment (R. 87).

As respondent knows, those documents simply showed the fact of his resort to the Adjustment Board and made clear that the identical matter presented to the court in his complaint for wrongful discharge had been presented by him to the Adjustment Board for determination pursuant to the provisions of the Railway Labor Act.

3. THE CONFLICT IN DECISIONS.

Respondent, in arguing that the decision below is not in conflict with *Wooley v. Eastern Airlines*, 250 F. 2d

1 The only concession mentioned in the opinion below was that both parties conceded that the Board's award was an "outright denial of the claim." (Opinion, Appendix B, p. 10a)

86 (C.A. 5), certiorari denied 356 U. S. 931, erroneously states (p. 7) that the court found the discharge was proper and supported and "thus" held the Board decision not subject to review. The court first determined that Wooley was bound by his election, but, noting that the Supreme Court had not passed on this question, deemed it appropriate to discuss other issues which were raised. The court's entire discussion of the propriety of the discharge was made only after it held that the doctrine of election of remedies barred the suit. Moreover, it was prefaced with the statement that "* * * [u]nder our initial determination that the suit could not be maintained, we would of course not reach this question." 250 F. 2d 86, 91, footnote 8.

It is noteworthy that respondent's only comment (p. 6) on the conflict between the decision below and *Majors v. Thompson*, 235 F. 2d 449 (C.A. 5), was that the court there cited its earlier decision in *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224 (C. A. 5). But this does not affect or lessen the conflict between the decision below and *Majors* and we do not understand respondent argues that it does. The *Michel* opinion mentions that the employe's claim had been determined by the Board "upon the merits." This was merely an observation of the court and it is clear from the opinion that it did not consider such to be a factor necessary to its application of the election of remedies doctrine.

Any possibility that the Court of Appeals for the Fifth Circuit considered such to be of any importance is completely dissipated by its opinion in the *Wooley* case[2] where it held that:

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2 The *Wooley* case was decided in *1957*, *Majors* in *1956*, and *Michel* in *1951*.

> "* * * If he [the discharged employe] determines that he will treat his grievance as involving a determination of rights as an employe under the bargaining agreement and asserts his rights to be retained as an employe he must go to the board for redress. If he accepts the action of the carrier as a final discharge he may sue in court for a breach of the contract of employment. *He may not do both.*" (250 F. 2d 86, 91; emphasis and interpolation supplied.)

In an effort to minimize the conflict of the decision below with decisions of other courts of appeals in the application of the "final and binding" provision of Section 3, First (m) of the Railway Labor Act, respondent states (p. 9) that the district court in *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350 (C.A. 2), affirming 141 F. Supp. 214, examined the record before the Board. Such review was wholly gratuitous and of no moment to its decision that the award was final and binding. The district court in *Weaver* held the Board award "conclusive" and, on the basis of abundant authority which it cited, "doubted" its power "to review the judgment of the System Board of Ajustment." 141 F. Supp. 214, 219.

In spite of his attempts to distinguish the decision below from the decisions of other courts of appeals cited by petitioner, the respondent has been unable to demonstrate that the decision below is not in conflict with those decisions. Additionally, it will be noted that respondent is unable to cite any decision squarely holding that a district court has jurisdiction to review the grounds relied upon by a Board in making a denial award and on the basis of such review nullify or disregard the "final and binding" clause of Section 3, First (m) of the Act. The court below had the same difficulty.

Respondent points to and cites (p. 8) the three decisions relied upon by the court below. In addition to the *Michel* case, *supra*, which has been discussed above and which does not hold that a court has any jurisdiction to review the grounds relied upon in a denial Board award, the court below cited *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, at page 249, affirmed by an equally divided court, 319 U. S. 732. There is nothing at page 249 of the *Boswell* decision which supports the holding below. Moreover, the decision below is in conflict with the basic principles of the *Boswell* case. (See 124 F. 2d 235, at pages 240 and 244.)

Also cited was the case of *Koelker v. Baltimore & O. R. Co.* (E.D., Pa.), 140 F. Supp. 887. This case, however, was not a discharge case (p. 888) and under *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, the district court was without jurisdiction in the matter. The district court recognized that the plaintiff could only bring a court action under the enforcement provisions of Section 3, First (p) of the Act and that an award in her favor was necessary to such action. The district court did not hold that it had any power to interpret or review the Board award. Instead, it held the case in abeyance to give plaintiff an opportunity to secure such an award or an interpretation under Section 3, First (m) of the Act.

4. THE DECISION BELOW WILL CREATE DISPUTES AND LITIGATION.

Respondent's recognition (p. 9) of the "large number" of wrongful discharge cases supports the petitioner's position that this case should be reviewed. It is asserted that there has been but one reported case (*Koelker v. Baltimore & O. R. Co., supra*) where question

was raised as to whether the Board denied a case on its merits. The question was raised in *Ramsey v. Chesapeake & O. R. Co.* (N. D., Ohio), 75 F. Supp. 740, 742, where the court held the Board award final and binding, notwithstanding that the Board had failed to make specific findings on all issues involved. (See footnote 5, p. 11, Petition.)

That there are few reported cases involving the grounds relied upon in a denial Board award is easily explained. Until the decision below, no other court of appeals decision even purported to sanction the jurisdiction of a court to look behind a denial Board award and determine, review and pass upon the grounds relied upon by the Board in making such award. Moreover, no other court of appeals had failed to apply the election of remedies doctrine or the "final and binding" provision of the Act to a denial Board award in a similar situation.

The decision below greatly increases the probability that this situation will recur, notwithstanding respondent's speculation (p. 10) as to its "salutary" effect. The decision below will furnish the occasion for many discharged employes, who have lost at the Board, to sue in court on the chance of being able to show that the Board failed to pass upon the "merits" of their cases - the courts being given blanket authority to decide what constitutes the merits of such cases.

What may appear to be the "merits" of a dispute to one judge may not be considered to be such by another. Similarly, what may appear to one judge to be a disposition or decision on the merits may appear differently to another judge. In this case, two judges have held that the Board did not pass on what they determined to be

the merits, while two other judges (the District Judge and Circuit Judge Healy) were of the opposite opinion. Accordingly, this decision relegates to the realm of speculation and uncertainty an area which the Act plainly intended should be finally determined by the Board, and thus unsettles something which Congress intended to quiet.

It is submitted that failure of the court below to follow the command of Section 3, First (m) of the Act, and hold the denial award "final and binding", will create disputes and litigation - the very thing Congress sought to avoid by such finality provision.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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